No. 91-1356

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1991

BOBBY BENFIELD,

Petitioner,

v.

FRANCIS B. SAUL, II, Individually,
CHEVY CASE ADVISORY COMPANY,
a Maryland Corporation, and
B. F. SAUL COMPANY, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the District Court improperly dismiss Petitioner's claims by misapplication of the "Two Dismissal Rule" when two prior voluntary dismissals were based on Court actions relying on North Carolina State law when the Federal action sub judice relies on Maryland State law?

II. Did the District Court err:

(a) In its application of Maryland State law; in barring Petitioner's action on the basis of its failure to state a valid claim for relief;

(b) In its conclusion that Petitioner could not satisfy an essential element of his case;

(c) In its application of the North Carolina Statute of Limitations

to the action and Petitioner's failure to assert personal jurisdiction?

III. Did the District Court apply its discretion in denying Petitioner's Motion for Discovery?

PARTIES

The parties to this proceeding are the Petitioner, Bobby H. Benfield, and the Respondents, Francis B. Saul, II, Individually; Chevy Case Advisory Company, a maryland Corporation; and B. F. Saul Company, Inc.

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No. 92____

UNITED STATES SUPREME COURT

_____ Term 1992

BOBBY H. BENFIELD,
Petitioner,

vs.

FRANCIS B. SAUL, II, Individually, CHEVY CASE ADVISORY COMPANY, a Maryland Corporation, and B. F. SAUL COMPANY, INC.
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioner, Bobby H. Benfield, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in the proceeding on October 30, 1991.

OPINIONS BELOW

The decision of the Court of Appeals is unpublished, and appears at pp. A2.

JURISDICTION

The judgment of the Court of Appeals was entered on October 30, 1991. This petition is filed wihtin 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254 (1).

STATEMENT OF THE CASE

On October 30, 1991, the United States Court of Appeals for the Fourth Circuit entered an unpublished per curiam opinion, affirming the District Court judgment entered on February 15, 1991. The Petitioner Bobby H. Benfield's appeal was denied and the District Court decision was affirmed.

The Petitioner, a citizen of Burke County, North Carolina, filed a civil

action, seeking tort recovery against the Respondents in the United States District Court for the Western District of North Carolina on October 1, 1990, seeking compensatory damages in amount in excess of Fifty Thousand and no/100 Dollars ($50,000.00) and punitive damages in an amount in excess of One Million and no/100 Dollars ($1,000,000.00).

The Respondents by and through their respective counsel filed five (5) defense motions to dismiss the action filed by the Petitioner. These motions were filed pursuant to Rule 12(b)(1), 12 (b)(2), 12(b)(6) and Rule 56 of the Federal Rules of Civil Procedure, seeking dismissal of the Complaint:

(1) For lack of subject matter jurisdiction;

(2) For the Voluntary Dismissal of two prior State actions on the same or similar claim;

(3) For the reason the claim is barred by the statute of limitation;

(4) For lack of in personam on jurisdiction;

(5) For that the Complaint fails to state a claim upon which relief can be granted.

The Petitioner on February 4, 1991, filed a motion for the taking of the deposition of the individual Respondents, to which the Respondents filed a reply or response on February 7, 1991.

This matter was called for Hearing before the Honorable Woodrow W. Jones on February 4, 1991, at which time oral argument was presented.

On February 19, 1991, the Court entered its Judgment and accompanying Memorandum of Decision.

The Petitioner filed Notice of Appeal on March 1, 1991.

The Respondents filed a Motion to Seal Record and, thereafter, an Order was entered by the Honorable Woodrow W. Jones, granting that Motion and sealing the record on March 25, 1991.

The Respondents, thereafter, filed a Motion with the United States Court of Appeals for the Fourth Circuit seeking to seal the record, and thereafter, a Stipulation among the parties was filed in this action.

The matter is before the Court to determine whether or not the Trial Court erred in granting the Respondents' Motions to Dismiss and in failing to grant the

Petitioner's Motion to Take Deposition of the individual Respondents.

REASONS FOR GRANTING THE WRIT

I. THE DISTRICT COURT INCORRECTLY CONCLUDED THAT THE FEDERAL COURT ACTIONS WAS BASED ON THE SAME SUBSTANTIVE LAW UPON WHICH THE TWO NORTH CAROLINA ACTIONS WERE BASED; HOWEVER, PETITIONER HAS A VIABLE ACTION AVAILABLE UNDER RECOGNIZABLE TORT WITHIN THE STATE OF MARYLAND. THIS RELIANCE SUPPORTS THE SUBSTANTIVE LAW WITH MARYLAND AND PROVIDES A SEPARATE AND INDEPENDENT BASIS FOR PETITIONER'S CAUSE OF ACTION, THEREFORE, PETITIONER RESPECTFULLY CONTENDS THAT THE TWO DISMISSAL RULE SHALL NOT APPLY.

This is an action brought by the Petitioner, a citizen of Burke County, North Carolina against the Respondents based on diversity of citizenship, seeking

recovery under the tort of intentional inflection of emotional and mental distress.

The Petitioner through his verified Complaint and through the Affidavit of his wife, filed on February 4th, set forth the factual bases for the filing of the Complaint. The Petitioner did not become aware of the events that had occurred until on or about October 2, 1987, and thereafter, caused to be filed on December 22, 1988, the original Complaint, which was attached to the Respondents' Memorandum, marked Exhibit "A". This action was dismissed without prejudice, pursuant to Rule 41 of the North Carolina Rules of Civil Procedure on March 10, 1989.

On April 2, 1990, a second action was filed naming the individual Respondents,

copy of which was attached to Respondent's Memorandum.

On October 1, 1990, the action herein was filed and, thereafter, the Petitioner elected to take a dismissal and filed 90-CVS-306, which appears as an Exhibit to the Respondents' Memorandum.

This action seeks recovery for the Petitoner for the tort of intentional infliction of emotional and mental distress alleged against the Respondent as result of the Petitioner learning of certain interaction between the Respondents and the wife of the Petitioner during her tenure with one of the corporate Respondents and her involvement with the individual Respondent. The Petitioner alleges that the individual Respondent engaged in sexual misconduct which the individual Respondents knew or by reasonable diligence should have

known would cause severe emotional and mental distress to the Petitioner, if he became aware of such activity; however, individually and acting in concert with the corporate Respondents, the activity continued, eventually causing the damage complained of by the Petitioner. The Petitioner, through verified Complaint, has alleged that the Respondents have significant contacts with the State of North Carolina through the operation of various properties within such state and, therefore, have sufficient minimal contacts to establish in personam jurisdiction over the Respondents.

The Petitioner on February 4th, filed a Motion seeking to take the deposition of the individual Respondents to attempt to settle the issues regarding involvement and ownership of properties within North

Carolina as alleged in the Petitioner's verified Complaint, filed in this action. The Court denied this Motion and enter the Order as appears of record.

II. THE TRIAL COURT ERRED IN ALLOWING RESPONDENTS MOTIONS TO DISMISS.

The first issue addressed by the Court in the Memorandum of Decision involves the second dismissal taken in the State Court action filed by the Petitioner. The Petitioner filed his first Complaint in Superior Court of Burke County, North Carolina, December 22, 1988, and, thereafter, obtained service upon the various Respondents named in that lawsuit. After several Motions to Dismiss were filed by the Respondents, the Petitioner voluntarily dismissed the action on March 10, 1989, pursuant to Rule 41 of the North Carolina Rules of Civil Procedure.

The Petitioner filed a second State Court action in Burke County, seeking damages for intentional infliction of emotional and mental distress and on November 8, 1990, and voluntarily dismissed the second action, pursuant to Rule 41 of the North Carolina Rules of Civil Procedure. The second action was never served upon the individual Respondent; however, prior to the dismissal, the Petitioner filed this action against the Respondents in Federal Court, relying not upon North Carolina law for its foundation, but rather on the law of the State of Maryland in seeking action through diversity of citizenship through the Federal Court of this nation.

It is respectfully contended that no prior action had been filed seeking recovery under the law of the State of

Maryland and, therefore, while the Petitioner could not maintain an additional action within the State of North Carolina relying upon the substantive law of this State, the Petitioner did have a viable action available under a recognized tort within the State of Maryland and attempted through this pleading to properly file a complaint seeking to recover damages suffered as a result of tortious conduct on the part of the Respondents, relying upon the substantive law of the State of Maryland. It is, therefore, respectfully contended that the "two dismissal rule" is not applicable.

There has never been, prior to the filing of this action any action filed pursuant to Maryland law, seeking recovery for torts which occurred in Maryland to residents of North Carolina, who now seek

through diversity of citizenship to bring that action. It is respectfully contended that had previous actions been brought in Maryland and dismissed, the dismissal, pursuant to 41(a)(1) would have been proper; but that is not the case. The Trial Courts determination that the action should be dismissed with prejudice as to Maryland actions through our Federal Court system cannot be predicated upon the Petitioner exhausting any remedies that he might, otherwise, have had, pursuant to North Carolina substantive law. The mere fact that no action is available through North Carolina, due to the fact that the actions occurred in Maryland does not prohibit, nor prevent, it is contended, the filing of a Federal action seeking to apply Maryland law to former Maryland residents for acts which occurred in Maryland and for

which the Statute of Limitations has not run. Clearly, the "two dismissal rule" does not apply with regard to the Federal action, since this is the first Federal action filed, seeking to apply Maryland law against the named Respondents. The Court in finding that both elements of the "two dismissal rule" had been met with respect to the claims against the individual Respondents is correct with regard to substantive actions under the State Law of North Carolina; however, it is respectfully contended that that has no effect and is improper with regard to the first and only action filed by the Petitioner against the Respondents seeking recovery under the substantive law of the State of Maryland; consequently, the City of Raleigh vs. College Campus Apartments, Inc. 94 NC Ap 280, 282, 380 SE 2nd 163, 165

(1989), affirmed per curiam, 326 NC 360 388 SE 2nd 768 (1990), case is clearly distinguished, since it applies only to the North Carolina actions that could be sought by North Carolina residents for substantive violations or torts occurring under the law of the State of North Carolina. Clearly, each of the previous actions filed by the Petitioner did not rely upon the diversity of citizenship, or the substantive law of the State of Maryland, but rather relies upon the law of North Carolina.

The Respondents second contention is that the Complaint does not state valid claim under applicable law. Since this is a diversity action, the law of the forum state, including its choice of law rules, should be applied. For actions involving torts, the State where the injury occurred is considers the situs of the claim. Thus,

under North Carolina law, when the injury giving rise to a claim occurs in another State, the law of that State governs resolution of the substantive issues in the controversy. Boudrea v. Baughman 322 NC 331, 335, 368 SE 2nd 849, 853-54 NC (1988)

Applying this conflict rule, Maryland law governs this case, because every alleged act relating to Petitioner's claim took place in the State of Maryland.

The law of Maryland does recognize the tort of "intentional infliction of emotional and mental distress", it would appear that the requirements are substantially the same as those of the North Carolina Statute. It is clear that intentional infliction of emotional and mental distress is a recognized tort under the laws of both Maryland and North Carolina.

In the case of Gasper vs. Lighthouse, Inc., 533 A 2nd 1358 (Md. Ct. Spec. App. 1987), cert. denied., 537 A 2nd 272 (Md. 1988). The Court, while dismissing a claim for intentional infliction of emotional and mental distress determining that it was "the refitting of an abolished action into other forms" clearly stated:

> "as a preface to our consideration of the issue raised, we wish to make clear that the abolition of the actions for alienation of affections and criminal conversation does not preclude a person from maintaining a traditional breach of contract action or a recognized tort action merely because the breach arose from an improper liaison with Plaintiff's spouse or because one effect of the alleged breach of tortious conduct was a disruption or break-up of his or her marriage. See, for example, Gillespie-Linton v. Miles, 58 Md. App. 484, 473 A 2nd 947 (1984); Anclote Manor Foundation v. Wilkinson, 263 So. 2nd 256 (Fla. Dist. Court App. 1972).

Clearly, what the Courts of Maryland sought to preclude was a Plaintiff simply changing labels and attempting to recover for injuries arising from "defilement of the marriage bed" or from an "interference with the marriage" by simply casting the Defendants conduct as a breach of contract, negligence or some other "intentional tort."

In the present case, the Petitioner is not seeking to recast defilement of the marriage bed or break-up of the marriage, although those are incidental. Clearly, in the incident case, the marriage has survived. There is no action stated for any tortious conduct save and except for that of the intentional infliction of emotional and mental distress by the Respondents upon the Petitioner. The reaction of the Petitioner to his learning

of the conduct on the part of the Respondents, clearly was the precipitating cause for the emotional and mental distress which he has suffered. It is that distress proximately caused by the acts of the Respondents, which are complained of through the traditionally accepted tort of intentional infliction of emotional and mental distress that give rise to the Petitioner's claim. This is not merely a recasting of some other action, but rather is a legitimate action on the part of the Petitioner to recover damages from the Respondents for acts which were intentionally done by the Respondents who knew or by reasonable diligence should have known would cause severe emotional and mental distress to the Petitioner, should he become aware of such activity. It is the character of the acts which demonstrate

the willful and wanton disregard of the Petitioner by the Respondents, that give rise to the action. The language used by the Respondents, coupled with the surreptitious manner in which the activities were carried out clearly demonstrate that said Respondents knew that if discovered, such activities would have a devastating effect on the Petitioner, and despite such knowledge persisted in such activity evidencing a willful desire to cause such emotional and mental distress to the Petitioner, all of which is complained of through this tortious action.

It is further respectfully contended that the Affidavit filed by the Petitioner's wife, together with the verified Complaint alleges sufficient acts and omissions on the part of the Respondents to establish a tortuous cause

of action for intentional infliction of emotional and mental distress, in light of the requirement that the allegations of the Petitioner be determined as true for the purpose of this Motion.

It appears that the Maryland Courts have not addressed the precise issue involved here; a fact acknowledged by Judge Jones on page nine (9) of the Memorandum, supporting the entry of his Judgment. Clearly, North Carolina law does not require the "presence requirement" for the tort of intentional infliction of emotional and mental distress, while other States, such as Washington, apparently do. Clearly, this area is unsettled in the law, with some States requiring strict adherence to the "presence require" and others not requiring such presence. It is respectfully contended that the law is

ever-changing in this area, as shown by cases involving suits by Petitioners in various jurisdiction years after the fact, where the intentional infliction of emotional and mental distress was by a person in a position of authority, such as a parent inflicting abuse upon a child. Since even the Trial Court acknowledges that the Maryland Courts have not addressed this precise issues, the very strict "presence requirement" as stated in restatement "second" of torts, Section 46, should not be applied.

It is respectfully contended that the applicable Statute of Limitations for the claims made by the Petitioner is the three (3) year State of Limitations as set forth in North Carolina General Statute Section 1-52(5), which is analogous to the Statute of Limitations for the tort of intentional

infliction of emotional and mental distress in Maryland.

"Under the Common Law, a cause of action accrues at the time the injury occurs 'even in ever so small a degree'... This is true even when the injured party is unaware that the injury exists." Pembee Manufacturing Corporation vs. Cape Fear Construction Co., 313 NC 488, ____, 329 SE 2nd 350,353 (NC 1985). The North Carolina Legislature however, has carved out an exception to the Common Law rule as follows:

> Unless otherwise provided by Statute, for personal injury or physical damage to claimant's property, the cause of action... shall not accrue until bodily harm to the claimant or physical damage to his property become apparent or ought reasonably to have become apparent to the claimant whichever first occurs. N.C. General Statute Section 1-52(16) emphasis added.

It is respectfully contended that mental or emotional distress are analogous to "bodily harm" or "physical damage to his property" and should, therefore, fall within the purview of the exception in allowing a three (3) year Statute of Limitations.

Clearly, in the Affidavit of the Petitioner and Petitioner's wife, the Petitioner was not advised of what had occurred until October 2, 1987, and has therefore commenced legal action within the applicable Statute of Limitations. It is further respectfully argued that additional revelations after the first discussion of the incident with the Petitioner by Petitioner's wife had been made which have continued to give rise on behalf of the Petitioner to actions for tortious conduct heretofore unknown. It is therefore

respectfully argued that, since the tort of intentional infliction of emotional and mental distress is an ongoing tort, each additional revelation heretofore unknown constituted grounds for a separate cause of action. It is respectfully contended that the Statute of Limitations did not toll until the Petitioner became aware of the initial revelations of his wife on October 2nd, and that additional revelations since that time set in motion additional Statute so Limitation concerning conduct occurring at a time prior to the revelation but undisclosed to the Petitioner until a later date. From a review of the law of Maryland, it appears that the law of Maryland is substantially in accord with that of North Carolina regarding the State of Limitations and the tolling of the State.

It is respectfully contended that he Petitioner did not have any reason to suspect the actions on the part of the Respondents prior to October 2, 1987, Petitioner's claims cited in Respondents' Memorandum, particularly Pembee Manufacturing Corporation v. Cape Fear Construction Co., 69 NC App. 505, 509, 317 SE 2nd 41, 43, NC CT APP (1984), is distinguishable. The Petitioner had no idea, nor any reason to suspect the acts and omissions on the part of the Respondents. It is further to be noted that the injuries suffered by the Petitioner did not occur until after he had been told by his wife on October 2, 1988, of what had occurred. Clearly, this differentiates the Petitioner's action from that as set forth in the case hereinabove.

By its express term, Section 1-52(16) delays the accrual of actions involving "bodily harm" to the Petitioner, or "physical damage to his property." In the case at large, it is respectfully argued that psychological harm is a form of "bodily harm" and, therefore, meets the requirement as set forth. It is, therefore, contended that the dismissal relying in whole or in part upon the issue of the Statute of Limitations was error.

The fourth contention dealt with in personam jurisdiction over the Defendants-Appellees. The sole question under this contention is whether the Respondents had sufficient contacts with the State of North Carolina, such that the maintenance of this action here does not offend traditional notions of fair play and substantial justice. These requirements have been

outlined by the Supreme Court of the United States in several land mark decisions. In International Shoe v. State of Washington, 326 US 310, 66 S. CT. 154, 90 L. ed. 2nd 95 (1945), the Court proclaimed that due process prevents the State to exercise personal jurisdiction over a non-resident Defendant only so long as there exists "minimum contacts", such that maintenance of the suit "does not offend traditional notions of fair play and substantial justice." To satisfy the minimum contacts threshold "there must be some act in which the Defendant purposely avails itself of the privilege of conducting activity within the forum state, thus invoking the benefits and protection of its law." Hanson v. Denckla, 357 US 235, 253, 78 S. CT. 1268 (1958) The Affidavits and documents offered in this file, by the Petitioner,

including the verified Complaint allege sufficient facts to establish minimum contacts as required by the case law. For the purposes of this action, the Affidavit and verified Complaint filed by the Petitoner are considered to be true, for the purpose of hearing. In the case of Buying Group, Inc. vs. Coleman, 296 NC 5 10, 515, 251 SE 2nd 610 (1979), the Supreme Court of North Carolina held where a non-resident defendant is a principal shareholder of a corporation, his corporate acts may be attributed him for the purpose of determining whether the Courts of this State may assert personal jurisdiction over him. The Affidavits previously filed in this action show that one or more of the Respondents is involved in real estate in numerous states and has served as Chairman of the Board of a trust which owns property

in Winston-Salem, North Carolina and has paid North Carolina taxes. It is respectfully contended that this is sufficient to meet the requirements of due process and, therefore, the dismissal in whole or in part based upon lack of personal jurisdiction was error.

In summation as to this first argument, it is respectfully contended that the Trial Courts dismissal constituted prejudicial error to the Petitioner and should therefore be reversed.

II. THE TRIAL COURT'S DENIAL OF THE PETITIONER'S MOTION FOR DISCOVERY ON THE ISSUE OF JURISDICTION CONSTITUTED PREJUDICIAL ERROR

On February 4, 1991, Petitioner filed a Motion For Taking of Deposition, seeking to clarify issues that had become very apparent during the oral argument presented before Judge Jones regarding the issues

related to in personam and jurisdiction. Clearly, the verified Complaint filed by the Petitioner as well as the documents submitted at the oral arguments indicated sufficient contacts between the Respondents and the State of North Carolina to meet the "minimum contacts" requirement of International Shoe v. State of Washington, 326 US 310, 66 S. CT. 154, 90 L. ed. 2nd 95 (1945). Clearly, the taking of the deposition would not have been a mere "fishing expedition", but rather would have been a substantive review of the activities of a multifaceted Respondents involved in numerous corporations throughout many states within the United States. Clearly, as indicated by counsel for the Petitioner, during his oral argument to trial judge, the Petitioner had no access, absent these discovery methods, to obtain the documents

necessary to firmly establish the issues, but rather had to rely upon the verified Complaint and the documents submitted pending final determination through the depositions or other documents. (App. 56).

Under Federal Rules of Civil Procedure 26 (c), District Courts are granted broad discretion to control the timing and extent of discovery. Where the discovery is an integral part of establishing whether or not one or more of the Respondents has sufficient contacts with North Carolina to establish "minimum contacts" is certainly within the discretionary authority of the Court. Given the complexity of this case and the number of issues, it is respectfully contended that the Trial Court's denial of the Motion was an abuse of that discretion and should, therefore, be reversed.

CONCLUSION

The Petitioner, for reasons as set forth hereinabove, respectfully prays this Court to grant this petition for a writ of certiorari for determination by this Court of the issues as set forth herein. The Petitioner respectfully argues that unless the petition is granted, the petitoner has no other course of redress for the protection of his constitutional rights. It is further respectfully argued that the Court of Appeals obviously erred in granting Respondents' Motion and denying Petitioner's Motion.

Respectfully submitted this the 28TH day of January, 1992.

C. GARY TRIGGS, P.A.

BY: _____

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No. 92____

UNITED STATES SUPREME COURT

_____ Term 1992

BOBBY H. BENFIELD,
Petitioner,

vs.

FRANCIS B. SAUL, II, Individually, CHEVY CASE ADVISORY COMPANY, a Maryland Corporation, and B. F. SAUL COMPANY, INC.
Respondents.

APPENDIX
PETITION FOR WRIT OF CERTIORARI

Appeal from the United States District Court for the Western District of North Carolina, at Shelby. Woodrow W. Jones, Senior District Judge. (CA-90-189-SH)

Submitted: September 18, 1991
Decided: October 30, 1991

Before PHILLIPS, MURNAGHAN, and WILKINSON, Circuit Judges.

C. Gary Triggs, POWELL & TRIGGS, Morganton, North Carolina, for Appellant. Robert B. Byrd, Robert C. Ervin, BYRD, BYRD, ERVIN, BLANTON, WHISNANT, McMAHON & ERVIN, P.A., Morganton, North Carolina; Benjamin S. Custer, Jr., SHAW, PITTMAN, POTTS & TROWBRIDGE, Washington, D.C., for Appellees.

Bobby Benfield appeals from a judgment of the district court dismissing with prejudice his diversity action brought against B. Francis Saul II and the B.F. Saul Co. Asserting a claim for intentional infliction of emotional distress, on he alternative grounds that Benfield's complaint failed to state a claim upon which relief could be granted; that the claim was precluded by Benfield's voluntary dismissal of two prior state court actions asserting the "same claim" for preclusion purposes; that the action was barred by the statute of limitations; and that personal jurisdiction over the defendants was lacking.

The parties waived oral argument in this court, we have considered the appeal on the written brief and record. For the

reasons expressed in the district court's memorandum opinion, Benfield v. Saul, N. CA-90-189-SH, slip op. at 3-6 (W.D.N.C. Feb. 19, 1991), we conclude, without addressing the other grounds for dismissal, that Benfield's voluntary dismissal of two prior state court actions constituted an adjudication on the merits of the claim in this action that required its dismissal with prejudice on ground s of claim preclusion.

The judgment of the district court is accordingly affirmed.

AFFIRMED.

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
SHELBY DIVISION
SH-C-90-189

BOBBY H. BENFIELD, Plaintiff,	)	
vs.	)	JUDGMENT
B. FRANCIS SAUL, II, Individually; CHEVY CHASE ADVISORY COMPANY, a Maryland Corporation, and B. F. SAUL COMPANY, INC., Defendants.	)	

The motions filed by the Defendants to dismiss this action are allowed for the reasons set forth in a Memorandum of Decision filed simultaneously herewith.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the action be and the same is hereby dismissed with prejudice.

This the 15th day of February, 1991.

s/ Woodrow W. Jones
United States District Judge

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
SHELBY DIVISION
SH-C-90-189

BOBBY H. BENFIELD Plaintiff, vs. B. FRANCIS SAUL, II, INDIVIDUALLY; CHEVY CHASE ADVISORY COMPANY, a MARYLAND CORPORATION, and B. F. SAUL COMPANY, INC., Defendants.	)	MEMORANDUM OF DECISION

THIS MATTER is before the Court upon five defense motions to dismiss the action. These motions were filed pursuant to Rule 12(b)(1) and (6) and Rule 56, Federal Rules of Civil Procedure and seek the dismissal of the complaint (1) for lack of subject matter jurisdiction; (2) for the voluntary dismissal of two prior state court actions on the same claim; (3) for the reason the claim is barred by the statute of limitations; (4) for lack of in personam

jurisdiction and (5) for that the complaint fails to state a claim upon which relief can be granted.

A hearing on the motions was held in Rutherfordton, North Carolina on February 4, 1991 and after due consideration of the file, documents, briefs and arguments of counsel the Court now enters its findings and conclusions.

The Plaintiff, Bobby H. Benfield of Burke County, North Carolina, filed a four count complaint on October 1, 1990 against the Defendants, B. Francis Saul, II, Chevy Chase Advisory Company, a Maryland corporation, and B. F. Saul Company, Inc. In count one of the complaint the Plaintiff alleges that Saul had an affair with the Plaintiff's wife "beginning in April, 1978" while she was employed as Saul's secretary with B. F. Saul Company in the State of Maryland. He contends that the affair was

intended to, and did, cause him severe emotional and mental distress when his wife told him about it "on or about October, 1987."

Count two is directed at two corporate Defendants, B. F. Saul Company and a corporation identified as "Chevy Chase Advisory Company." The Plaintiff alleges that Saul was an employee o f both corporations and that the corporate Defendants knew or should have known of the alleged affair and were recklessly indifferent to the emotional distress it would cause Plaintiff when he learned of it.

The Defendants Saul and B. F. Saul Company were served with process and filed these motions to dismiss, but the other corporation, "Chevy Chase Advisory Company" was not served and the Defendant Saul testified by affidavit that he has no

connection with, and has never heard of, any such corporation.

Counts three and four of the complaint do not state separate causes of action but merely assert Plaintiff's claim for compensatory and punitive damages for the alleged misconduct set forth in counts one and two.

The Defendants Saul and B. F. Saul Company ("Company") contend that even assuming the truth of Plaintiff's allegations, as they must for the purposes of these motions, at least four fatal defects are apparent on the face of the complaint.

First, because Plaintiff voluntarily dismissed both of his prior state court actions based on the same facts, the second dismissal operated as an adjudication of his claims on the merits. See, Rule 41(a)(1), North Carolina Rule of Civil

Procedure. Thus, the Defendants contend that the Plaintiff's claims in this Court are barred as a matter of law.

Second, the complaint fails to state a claim against the Defendants. To begin with, Plaintiff's emotional distress claims are barred by applicable Maryland law. In any event, Plaintiff cannot satisfy a crucial element of these claims.

Third, the applicable North Carolina three-year statute of limitations bars Plaintiff's claim. N.C.G.S. 1-52(5).

Fourth, constitutional due process does not permit Plaintiff to bring the Defendants, an individual Maryland resident and a District of Columbia corporation, respectively, into federal court in North Carolina when he alleged torts and injuries which occurred in Maryland, involving parties who were Maryland residents at the time.

The Court will now examine each of these four alleged fatal defects and rule on them separately.

The first contention is that the claims are barred by the Two Dismissal Rule. The Plaintiff filed his first complaint in the Superior Court of Burke County, North Carolina on December 22, 1988 against the Defendant Saul alleging claims for criminal conversation, alienation of affections and intentional infliction of emotional distress. After Saul filed several motions to dismiss the Plaintiff voluntarily dismissed the action on March 10, 1989, pursuant to Rule 41 of the Rules of Civil Procedure.

On April 2, 1990 the Plaintiff filed his second state court action in Burke County, North Carolina Superior Court against the Defendant Saul setting forth a claim for intentional infliction of

emotional distress. On November 8, 1990 the Plaintiff voluntarily dismissed the second action pursuant to Rule 41 of the North Carolina Rules of Civil Procedure. Both complaints describe the same alleged misconduct set forth in the complaint in the case at bar. See the certified record of the state court cases.

Rule 41(a)(1), Federal Rules of Civil Procedure provides in part:

> Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

This 'two dismissal rule, as it is called, was intended to prevent delays and harassment by plaintiff securing numerous dismissals without prejudice, "Wright & Miller, Federal Practice and Procedure:

Civil, § 2368 at p. 187. "If the state has a rule like Rule 41(a)(1), the dismissal in state court would be an adjudication on the merits in the state court by virtue of the state rule and would bar, as would any adjudication on the merits, a new suit in federal court." Id. at pp. 190-91. North Carolina has a rule like Rule 41(a)(1) which reads in pertinent part as follows:

> (a) Voluntary dismissal; effect thereof,--
>
> (1) By Plaintiff; by Stipulation.-- Subject to the provisions of Rule 23(c) and of any statue of this State, an action or any claim therein may abe dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state

> or of the United States, an action based on or including the same claim.

N.C.Gen.Stat. § 1A-1. Rule 41(a)(1) (1990) (emphasis added). As applied by North Carolina courts, the North Carolina two dismissal rule has two elements: (1) the plaintiff must have filed the notices to dismiss under Rule 41(a)(1)(i), and (2), "the second suit must have been 'based on or included the same claim' as the first suit." City of Raleigh v. College Campus Apartments, Inc., 94 N.C.App. 280, 282, 380 S.E.2d 163, 165 (1989), aff'd per curiam, 326 N.C. 360, 388 S.E.2d 768 (1990).

Without question both elements of the two dismissal rule are met with respect to the claims against the Defendant Saul. First, the Plaintiff voluntarily dismissed both actions pursuant to Rule 41(a)(1)(i), North Carolina Rules of Civil Procedure. Second, Plaintiff's second action alleged

the same claim for intentional infliction of emotional distress that he claimed in the first action and which he now asserts for a third time. The Plaintiff's contention set forth in his brief filed February 4, 1991, that he filed the notice of dismissal in the second state case after he filed this action here does not change the situation. If a party could get around the rule that easy it would be worthless. The Court must conclude that Plaintiff's claim against Saul has been adjudicated on the merits and Plaintiff is barred from reasserting it in this Court.

Plaintiff's claim against B. F. Saul Company, Inc. is barred for the same reason. Although the Company was not a defendant in the prior actions, the two dismissal rule "operates as an adjudication upon the merits and prevents the institution of another action on the same

claim." Wright & Miller, Federal Practice and Procedure: Civil § 2368 at page 187. See also City of Raleigh, supra. Here the two prior actions were "based on" the same set of alleged facts and "included" the same claims of emotional distress as are found in the present claim advanced by the Plaintiff. Both state court complaints alleged that Plaintiff's wife was employed by the Company, which was owned in whole or in part by Saul. In the City of Raleigh case, the Court held that the North Carolina two dismissal rule barred an action against a corporate defendant even though the initial action had been brought only against an individual. 94 N.C.App. at 285. The Court concluded that, by its clear terms, North Carolina Rule 41(a)(1) does not have a "same defendant limitation" and that there was no basis for judicially adding a requirement the General Assembly

intended to leave out. 94 N.C.App. at 284.

The Court concludes that Plaintiff's claims against both the Defendants have been adjudicated on the merits and must be dismissed.

The Defendants second contention is that the complaint does not state a valid claim under applicable law.

The true nature of the Plaintiff's current action is reflected in his first state court action. The complaint in the first action alleged counts for criminal conversation, alienation of affections, and intentional infliction of emotional distress. The Defendants motions to dismiss the first complaint pointed our that actions for criminal conversation and alienation of affections were barred by the applicable law of Maryland. Apparently, in an effort to get around this problem

the Plaintiff dropped those two claims in the current complaint. However, the Plaintiff cannot assert an abolished action by recasting it in another form.

Since this is a diversity action, the law of the forum state, including its choice of law rules, should be applied. The North Carolina Supreme Court describes this state's choice of law rule as follows:

> Our traditional conflict of laws rule is that matters affecting the substantial rights of the parties are determined by lex loci, the law of the situs of the claim. . . . For actions sounding in tort , the state where the injury occurred is considered the situs of the claim. Thus, under North Carolina law, when the injury giving rise to a . . . claim occurs in another state,k the law of that state governs resolution of the substantive issues in the controversy.

Boudreau v. Baughman, 322 N.C. 331, 335, 368 S.E.2d 849, 853-54 (N.C. 1988). In Darnell v. Rupplin, 91 N.C.App. 349,

351, 371 S.E.2d 743, 745 (1988), the Court notes that a "claim for alienation of affections is a transitory tort because it is based on transactions that can take place anywhere. . ." The Court stated that the "substantive law applicable to a transitory tort is the law of the state where the tortious injury occurred, and not the substantive law of the forum state." Id.

Applying this conflict rule here, Maryland law governs this case because every alleged act relating to Plaintiff's claims took place in the State of Maryland. In count one paragraphs 3 and 5 of the complaint the Plaintiff alleges that the Defendants "set about on a course of action" to cause emotional distress to the Plaintiff beginning in April 1978 while Plaintiff's wife still resided in Maryland. In addition, the Plaintiff and his wife

still resided in Maryland when he learned in October 1987 of the alleged affair and it was not until after suffering the alleged emotional distress and related embarrassment that the Plaintiff moved to North Carolina. See complaint paragraph 9, count one and paragraph 2, count 4. Plaintiff makes no allegation that anything occurred in North Carolina which could result in the application of North Carolina law to this case.

Actions for alienation of affections were abolished by the legislature o f Maryland over forty years ago. See Md. Fam. Law Code Ann. § 3-103. A Maryland court described the legislative intent as follows:

> The Legislature found that the action had been "subjected to grave abuses, causing extreme annoyance, embarrassment, humiliation and pecuniary damage to many persons wholly innocent and free from wrongdoing, who were merely the victims of

circumstances. . ." 1945 Md. Laws, Ch. 1010.

Gasper v. Lighthouse, Inc., 533 A.2d 1358 (Md.Ct.Spec.App. 1987), cert. denied, 537 A.2d 272 (Md. 1988). In 1980, the Maryland Court of Appeals also abolished the tort of criminal conversation, noting that "criminal conversation is notorious for affording a fertile field for blackmail and extortion because it involves an accusation of sexual misbehavior" and holding that the tort was in conflict with the state equal rights amendment. Kline v. Ansell, 414 A.2d 929, 931, 933 (Md. 1980).

In Gasper v. Lighthouse, Inc., supra, the court dismissed a claim for intentional infliction of emotional distress under circumstances analogous to those present here. There, the defendant, a marriage counselor, was alleged to have begun "an

affair" with the plaintiff's wife. The court dismissed plaintiff's claims for intentional infliction of emotional distress, holding that it was in effect a claim for damages for criminal conversation and alienation of affections and that a party precluded from "the refitting of the abolished actions into other forms."

The Court concludes that the Plaintiff's emotional distress claims is nothing more than a thinly disguised, and entirely transparent" action for alienation of affections or criminal conversation which cannot be maintained under Maryland law.

But assuming arguendo that Plaintiff's claim is not barred, he has not and cannot state claims for intentional infliction of emotional distress under the facts of this case.

Plaintiff's emotional distress claim (also referred to as the tort of outrage) does not fit the typical factual pattern in which the defendant engages in some extreme and outrageous conduct directed at the plaintiff. Instead, here, Plaintiff claims emotional distress from learning, almost ten years after the fact, of alleged conduct directed at a third person, his wife.

Maryland courts follow the Restatement's approach to claims of intentional infliction of emotional distress. See Harris v. Jones, 380 A.2d 611, 614 (Md. 1977). Section 46 of the Restatement (Second) of Torts provides as follows:

> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

> (2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress
>
> (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or
>
> (b) to any other person who is present at the time, if such distress results in bodily harm.

(Emphasis added). Thus, where the outrageous conduct is directed at a third party, as is alleged in the present case, recovery is limited "to plaintiffs who were present at the time, as distinguished from those who discover later what has occurred." Restatement (Second) of Torts § 46 at Comment 1.

The presence requirement is explained as follows:

> The limitation may be justified by the practical necessity of drawing the line somewhere, since the number of persons who may suffer emotional distress at the

> news of an assassination of the President is virtually unlimited, and the distress of a woman who is informed of her husband's murder ten years afterward may lack the guarantee of genuineness which her presence on the spot would afford.

Id. This rationale is particularly appropriate here since the Plaintiff did not learn of the alleged conduct until almost ten years after it occurred.

While it appears that Maryland courts have not addressed this precise issue, other courts have applied the presence requirement to bar claims similar to those asserted by the Plaintiff. The case of Lund v. Caple, 675 p.2d 226 (Wash. 1984), involved a claim for intentional infliction of emotional distress by a plaintiff husband against a church and its pastor based on the allegation that the pastor had sexual relations with plaintiff's wife.

In affirming summary judgment for the defendants, the Court stated:

> The fatal flaw in appellant's outrage theory is that he was not present when the alleged outrageous conduct occurred, and did not even learn of the conduct until several months later. Since appellant was not present, he has not established the tort of outrage. Such presence is a crucial element of a claim for outrage when the conduct is direct at a third person.

See also H. L. O. by L. E. O. v. Hossle, 381 N.W.2d 641, 644-48 (Iowa 1986) (affirming grant of summary judgment on emotional distress claim where parents were not present and did not learn of defendant's alleged sexual abuse of their children until two months later) (collecting cases); Calliari v. Sugar, 435 A.2d 139, 141-42 (N.J. Super. 1980) (adopting the Restatement § 46 requirement of presence and dismissing claim for emotional distress).

It therefore appears that the Plaintiff's claim must be dismissed because he cannot satisfy the crucial element of presence.

The third and fourth contentions of the Defendants as to why this action should be dismissed deal with the statute of limitations and in personam jurisdiction. Both raise close legal questions and their resolution by the Court is not necessary since it has already determined that the action must be dismissed. However, in order for the entire matter to be before the Court of Appeals, in the event of an appeal, the Court will determine these issues.

The third contention is that the claim is barred by the statute of limitations. Because statutes of limitations are procedural, North Carolina law applies. Boudreau v. Baughman, 322 N.C. 331, 368

S.E.2d 849, 854 (1988). The parties do not dispute that the North Carolina three-year statute, N.C.G.S. 1052(5) applies to this case. According to Plaintiff's original state court complaint the alleged acts giving rise to his claim occurred "during the period of time from 1978 to 1979." Count 1, paragraph 7. Nothing else appearing the claim would be barred by the statute. However, the Plaintiff alleges he had no knowledge of the acts until "on or about October, 1987" or "until after October, 1987." So the question arises whether this allegation can toll the three-year statute.

Under the common law, a cause of action accrues at the time the injury occurs, "even in ever so small a degree" (citations omitted). "This is true even when the injured party is unaware that the injury exists" (citation omitted). This

common law rule is modified by the provisions of N.C.G.S. § 1-52--(16) which provides:

> Unless otherwise provided by statute, for personal injury or physical damage to claimant's property, the cause of action--shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs.

Pembee Mfg. Corp. v. Cape Fear Const. Co., 313 N.C. 488, 492, 329 S.E.2d 350, 353 (1985).

There is two reasons why Plaintiff's claim does not fall within this exception to the normal accrual of causes of action. First, in interpreting a statute, "[i]t is always presumed that the legislature acted with care and deliberation and with full knowledge of prior and existing law." Wilder v. Amatex Corp., 314 N.C. 550, 562, 336 S.E.2d 793, 804 (1970). By its express terms, § 1-52(16) only delays the accrual

of actions involving "bodily harm" to the Plaintiff or "physical damage to his property." The Plaintiff alleges that he has suffered emotional and mental distress. The Plaintiff's claim does not fall within the type of latent injury that can serve to delay the accrual of his cause of action.

Second, assuming arguendo that § 1-52(16) would apply to Plaintiff's claim, he alleged in his initial verified state court complaint in paragraph 11, count one:

> That while the Plaintiff during the period in question, noticed drastic changes in the personality of his wife and their relationship, he did not become aware of the facts involving the Defendant's activities until October 1987, when he was advised by his wife of what had occurred.

In Pembee Mfg. Corp. V. Cape Fear Constr. Co., 69 N.C.App. 505, 509 317 S.E.2d 41, 43 (1984), the Court of Appeals stated that, although § 1-52(16) modifies the

common law rule on accrual of actions, "[i]t does not change the fact that once some physical damage has been discovered the injury springs into existence and completes the cause of action." The North Carolina Supreme Court affirmed, holding that "as soon as the injury becomes apparent to the claimant or should reasonably become apparent, the cause of action is complete and the limitation period begins to run. It does not matter that further damage could occur, such further damage is only aggravation of the original injury." Pembee Mfg. Corp. v. Cape Fear Constr. Co., 313 N.C. at 493.

The Court concludes that § 1-52(16) would not prevent the limitations period from running after the Plaintiff "noticed drastic changes in the personality of his wife and their relationship" in 1978-1979.

It therefore follows that the claim

is now barred by the three-year statute of limitations.

The fourth contention deals with in personam jurisdiction over the Defendants. The sole question under this contention is whether the Defendants have sufficient contacts with the State of North Carolina such that the maintenance of this action here does not offend traditional notions of fair play and substantial justice. These requirements have been outlined by the Supreme Court of the United States in several landmark decision. In International Shoe v. State of Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed.2d 95 (1945), the court proclaimed that due process permits a state to exercise personal jurisdiction over a nonresident defendant only so long as there exist "minimum contact" such that maintenance of the suit "does not offend 'traditional

notions of fair play and substantial justice.'" The relationship between the defendant and the forum must be such that it is "reasonable . . . to require the [party] to defend the particular suit which is brought there." International Shoe, 326 U.S. 310, 317. To satisfy the minimum contacts threshold "There must be some act in which the Defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. 235, 253, 78 S.Ct. 1268, (1958). Stated another way, the "defendant's conduct in connection with the forum State" must be "such that he should reasonably anticipate being haled into court there." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 100 S.Ct. 580, 62 L.Ed.2d 490 (1980).

All parties admit that the alleged

misconduct occurred in the State of Maryland between Maryland citizens. The only connection of the parties to North Carolina arises when the Plaintiff left Maryland and moved to North Carolina some few months before filing his original state court action here and allegation or contention by the Plaintiff that the Defendant corporation owns a shopping center in Winston-Salem, North Carolina and the Defendant Saul owns and operates the corporation.

The affidavits and the documents offered, even the document offered by the Plaintiff, reveal that the shopping center belongs to the B. F. Saul Real Estate Investment Trust and not to either of the corporations named in the complaint. There is no showing that the B. F. Saul Company, Inc. owns the shopping center or any other property in this state. There is nothing

to indicate that the B. F. Saul Company Inc. a corporation incorporated under the laws of the District of Columbia had any contact with the State of North Carolina and this Court does not have in personam jurisdiction of said company and its motion to dismiss must be allowed.

The only suggestion that the Defendant Saul has any contact with this state is the showing of the existence of the B.F. Saul Real Estate Investment Trust and its ownership of a shopping center in Winston-Salem and that Saul is chairman of the board of the Trust as well as a major stockholder. The affidavit of Saul shows the trust owns real estate in some thirteen states. There has been no showing that Saul as the chairman of the board has in any way supervised the operation of the shopping center in Winston-Salem or has ever visited the property. The showing is

not sufficient to meet the requirements of due process. In the case of Buying Group, Inc. v. Coleman, 296 N.C. 510, 515, 251 S.E.2d 610 (1979), the Supreme Court of North Carolina held where a non resident defendant is a principal shareholder of a corporation and conducts business in North Carolina as principal agent for the corporation, his corporate acts may be attributed to him for the purpose of determining whether the courts of this state may assert personal jurisdiction over him. But in the case at bar there has been no showing that Saul has ever been to the property or conducted any business of any kind.

At the hearing on February 4, 1991 the Plaintiff filed a motion for discovery on the issue of jurisdiction. The motions to dismiss were filed on November 30, 1990 and a motion to dismiss for lack of in personam

jurisdiction over the Defendant Saul was filed in both the state court actions so the Plaintiff has had ample time to proceed with gathering evidence on this issue. The motion will be denied.

The Court concludes that this Court does not have in personam jurisdiction over the Defendants and the action must be dismissed.

For all the reasons set forth above the Court will allow the Defendants' motions to dismiss. A judgment dismissing the action with prejudice will be entered simultaneously herewith.

This the 15th day of February, 1991.

Woodrow W. Jones
United States District Judge